(3)

No. 04-318

Supreme Court, U.S.
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In The
Supreme Court of the United States

SAMUEL T. POOLE,

Petitioner,

v.

FAMILY COURT OF NEW CASTLE COUNTY, LORETTA M. YOUNG, EMMA HAYES, FLORENCE F. WRIGHT, JOHN W. NAILS, EDWARD J. ZETUSKY, JR., WALTER T. REDAVID, DELAWARE COUNTY BAR ASSOCIATION, and JOHN DOE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

The Attorney General of the State of Delaware, on behalf of Respondents, Family Court of New Castle County, Delaware and Master Loretta Young of Family Court of New Castle County, Delaware respectfully requests this Honorable Court to deny the petition seeking review of the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the District of Delaware is unreported. (Pet.App. 13a-22a). The opinion of the Third Circuit Court of Appeals is reported at 368 F.3d 263 (3d Cir.2004). (Pet.App. 1a-12a). The Third Circuit's first order denying the petition for rehearing and rehearing *en banc* appears at Pet.App. 23a-24a. The amended order denying the petition for rehearing and rehearing *en banc* appears at Pet.App. 25a-26a.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 13, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Petitioner is a prison inmate who was incarcerated at the Delaware Correctional Center, Smyrna, Delaware

when he commenced this litigation. Although filed as a writ of habeas corpus, the Delaware District Court construed Petitioner's complaint as filed pursuant to 42 U.S.C. §1983. Petitioner's Complaint was later dismissed on March 26, 2002, pursuant to 28 U.S.C. §1915(e)(2)(B)-1915A(b)(1) for being legally frivolous. The Petitioner subsequently appealed to the Third Circuit which dismissed the appeal for being untimely filed; and therefore, the Court lacked jurisdiction.

Petitioner concedes he filed a notice of appeal 44 days after the entry of judgment; however, he attributes the delay to the Clerk of the District Court rather than to his own dilatory actions. Federal Rule of Civil Procedure 77(d) specifically provides: "Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed. . . . " F.R.Civ.P.77(d).

> It is neither feasible nor legally required that the clerks of the district courts undertake independently to maintain current addresses on all parties to pending actions. It is incumbent upon litigants to inform the clerk of address changes, for it is manifest that communications between the clerk and the parties or their counsel will be conducted principally by mail. In addition to keeping the clerk informed of any change of address, parties are obliged to make timely status inquiries. Address changes normally would be reflected by those inquiries if made in writing.

Fields v. Keating, 1998 WL 146398 (N.D.N.Y.) (quoting *Perkins v. King*, No. 84-3310, slip op. at 4 (5th Cir.1985)). Petitioner's appeal should have been dismissed on the basis of Fed.R.Civ.P.77(d) alone.

Petitioner claims that the Third Circuit should have construed his notice of appeal as a motion to re-open the time for filing an appeal because the petitioner met the Fed.R.App.P.4(a)(6) requirements. To support his thesis, the Petitioner cites to several cases in other circuits, specifically the Eleventh Circuit case of *Sanders v. United States*, 113 F.3d 184 (11th Cir.1997) (per curiam). In granting the motion in *Sanders* to construe a notice of appeal as a motion to re-open, the Court concluded that Rule 4(a)(6) motions should be treated differently or more liberally than Rule 4(a)(5) motions; otherwise, *Sanders*, a *pro se* prisoner, could be denied access to the courts through no fault of his own. *Id. Sanders* further states that the Court has a duty to "liberally construe [a *pro se* litigant's] assertions to discern whether jurisdiction to consider his motion can be founded on a legally justifiable base." *Sanders*, at 187, citing, *Fernandez v. United* States, 941 F.2d 1488, 1491 (11th Cir.1991); *see also Haines v. Kerner*, 404 U.S. 519, 520 (1972) (noting that *pro se* pleadings should be held "to less stringent standards than formal pleadings by lawyers"). Lastly, *Sanders* claims that prison officials could block a prisoner's access to court by delaying giving the prisoner the judgment order until the appeal time had expired. ("As defendants in a *pro se* prisoner's civil rights action, prison officials may have every incentive to delay, and, even if he suspects delay by prison authorities, the *pro se* prisoner is helpless to investigate or prove such dilatoriness.") quoting *Houston v. Lack*, 487 U.S. 266, 271 (1988). The Third Circuit did not find *Sanders'* reasoning persuasive.

REASONS FOR DECLINING REVIEW

Third Circuit's Decision

The timely filing of a notice of appeal is mandatory and jurisdictional. *Browder v. Director, Illinois Dept. of Corrections,* 434 U.S. 247 (1978). Pursuant to Fed.R.App.P.4(a)(1), a notice of appeal in a civil suit is required to be filed within thirty days of the entry of judgment.

The Court of Appeals for the Third Circuit has not decided whether a district court may construe a notice of appeal as a Rule 4(a)(6) motion to re-open the time for appeal, but has refused to construe a notice of appeal as a Rule 4(a)(5) motion reasoning that Rule 4(a)(5) expressly requires the filing of a motion. *Herman v. Guardian Life Ins. Co.,* 762 F.2d 288, 289-90 (3d Cir.1985).

Prior to the 1979 amendment to Rule 4(a)(5) many courts including the Third Circuit had treated an untimely notice of appeal as a motion for extension of the time if the notice was filed within the thirty day grace period. *Id.* at 289. However, since the 1979 amendments, this is no longer feasible in civil cases. In such actions, courts are not permitted to treat, as a motion for an extension, a bare notice of appeal, even one from a *pro se* litigant that is filed outside the time provided in Rule 4(a)(1) but within the 30 day grace period. *See Campos v. LeFevre,* 825 F.2d 671, 676 (2d Cir.1987). A "motion to appeal" was a mere notice of appeal that, standing alone, could not be construed as a motion for extension of appeal time. *Wilder v. Chairman of Central Classification Bd.,* 926 F.2d 367, 371 (4th Cir.), *cert. denied,* 502 U.S. 832 (1991).

Rule 4(a)(5) as amended, however, specifically conditions extension of the time in which a notice must be filed upon the filing of a motion within thirty days after the expiration of the initial thirty day filing period. Rule 4(a)(5) as amended, prohibits consideration of excusable neglect or good cause where an appellant fails to file a timely *motion* requesting an extension of time. (emphasis added). A late notice of appeal which fails to allege excusable neglect or good cause can no longer be construed as a motion for an extension of time. *Myers v. Stephenson,* 748 F.2d 202 (4th Cir.1984); *Campbell v. White*, 721 F.2d 644 (8th Cir.1983); *Wyzik v. Employee Benefit Plan of Crane Co.,* 663 F.2d 348 (1st Cir.1981); *Sanchez v. Board of Regents of Texas Southern University*, 625 F.2d 521 (5th Cir.1980). *See also* 9 Moore's Federal Practice ¶204.13[2] at 4-104 (2d ed.1985) (result of failure to file timely notice followed by failure to make a timely motion extinguishes the right to appeal beyond revival). The Third Circuit after reviewing the Committee Notes to the 1979 Amendments and case law held that an extension may not be granted under Appellate Rule 4(a)(5) unless a motion is filed meaning "if a party so moves."

Consistent with this reasoning, the Third Circuit holds a similar interpretation of Rule 4(a)(6) as this rule contains similar language to Rule 4(a)(5). According to Rule 4(a)(6)'s relevant part, the district court may reopen the time to file an appeal for a period of 14 days . . . but only if all the following conditions are satisfied . . . the motion is filed within 180 days after the judgment or order. . . . Rule 4(a)(6). Rule 4(a)(5) and Rule 49(a)(6) both require motions according to the rules as well as the Committee Notes. The careful balancing of interests revealed by the text of Rule 4(a)(6) and the Committee

Note is a compelling reason for adherence to the language of the rule. *Marcangelo v. Boardwalk Regency*, 47 F.3d 88,91 (3d Cir.1995). When a procedural rule uses the precise phrase employed by the Advisory Committee, it can reasonably be inferred that the phrase means the same thing in both contexts. The Third Circuit's decision below does not misconstrue Rule 4(a)(6). The Third Circuit concluded that because the decision in *Herman* was based on language in Appellate Rule 4(a)(5) and its Committee Note which is not significantly different from language in Appellate Rule 4(a)(6) and its Committee Note, *Herman* should be applied in Petitioner's case as well. The Third Circuit, therefore, held that Appellate Rules 4(a)(5) and 4(a)(6) must be read consistently, and thus concluded that Rule 4(a)(6) demands a motion. Admittedly, the decision of the Third Circuit does conflict with decisions of other circuits; however, the construction and effect given to these rules by the Third Circuit are consistent with the Committee Notes.

Petitioner's *Pro Se* Status

When through no fault of his own, a *pro se* litigant does not receive notice of the order from which he seeks to appeal, it would be unjust to deprive him of the opportunity to present his claim to this court. *Sanders*, 113 F.3d at 187. In the case at bar, however, the Petitioner is not without fault. As Petitioner's brief explains, he informed the district court on March 22, 2002, that he would be returning to Pennsylvania, that his Delaware release date being March 24, 2002. (App. 4a). Thus, as early as March 22, 2002, Petitioner knew that he was going to have a change of address but did not provide it to the court. The entry of judgment was issued on March 26, 2002, and was

sent to the only address the district court had on record which was in Delaware. On April 1, 2002, the Petitioner again wrote a letter informing the court that it would take "a couple of weeks to get a pen or to make a phone call or to get some paper. . . ." (App. 4a). At the top of the page is a Pennsylvania address; however, the letter does not state that the address is a new address, nor does the letter request the clerk's office to forward any notices to the address on the letter. As previously stated, it is not the duty of the clerk's office to check each correspondence it receives to see if the address is different than the address on any previous correspondence. Although requirements of technical pleading and conformity with procedural rules should be viewed liberally when a litigant is acting *pro se,* the rules are not suspended simply because the litigant is unrepresented by counsel. The *pro se* litigant must exercise reasonableness and good faith in prosecution of his claims. *Carter v. Three Unknown Police Officers,* 112 F.R.D. 48, 52 (D.Del.1986). It was entirely reasonable for the Petitioner in his April 1, 2002, letter to the district court to acknowledge his transfer to Pennsylvania and in doing so specifically inform the court of his new address. The court was informed of Petitioner's new address on April 29, 2002, a month after his release and transfer to Pennsylvania. The resultant delay in receipt by Petitioner of the March 26th ruling was attributable solely to Petitioner's action or, more appropriately, inaction. The Third Circuit concluded that although the *Sanders* Court determined that it had a duty to liberally construe a *pro se* litigant's submission, this duty cannot justify taking a fundamentally different approach in interpreting filings under Rules 4(a)(5) and 4(a)(6).

Denial of Access to the Court

"As defendants in a *pro se* prisoner's civil rights action, prison officials 'may have every incentive to delay,' and, even if he suspects delay by prison authorities, the *pro se* prisoner is helpless to investigate or prove such dilatoriness." *See Houston v. Lack,* 487 U.S. 266, 271-72, (1988). The Third Circuit was not moved by this argument in *Sanders* regarding its interpretation of Rule 4(a)(6). (App. 11a). Petitioner claims "the Third Circuit's approach would allow prison officials to block prisoners' access to the courts by ensuring that they do not receive notice of an adverse decision until after the time provided by Rule 4(a)(1)." As the Third Circuit stated, this argument is based on a hypothetical situation that is unlikely to arise with any frequency – if at all. (App. 11a). Correctional personnel have too many responsibilities, such as maintaining prison security, to monitor daily mail containing numerous court decisions, orders, docket sheets, letters, etc., arriving at prison facilities. Legal mail is opened in the presence of the inmate and then only to confirm that it is legal mail; it is not read by personnel. Furthermore, if correctional personnel did engage in obstruction of prisoners' legal mail they risk termination from employment and possibly a prisoner lawsuit. The Third Circuit rightfully stated that it would not permit its interpretation of Rule 4(a)(6) to be governed by such an extreme hypothetical as put forth by *Sanders.*

Petitioner urges that the writ should be granted to resolve conflicting decisions regarding the interpretation of Fed.R.App.P.4(a)(6) among the circuit courts. In light of Petitioner's failure to timely file a notice of appeal to the Third Circuit, and thus his failure to meet the requirements of the Federal Rules as well as with the decisions of

the Third Circuit, the resolution of any conflict is irrelevant to the ultimate outcome. As a result, the question posed by Petitioner does not merit further consideration. *See Board of Educ. v. McCluskey*, 458 U.S. 966, 972 (1982) (Stevens, J., dissenting); *Boag v. MacDougall*, 454 U.S. 364, 366 (1982) (O'Connor, J., concurring); *id.* at 368 (Rehnquist, J., dissenting).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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